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Pikeville RV Sales, Inc. v. Dept. of Revenue, K13-R-16 (Ky. Bd. Tax App. August 28, 2013) and *Friebert Forest Products, Inc. v. Nelson County Property Valuation Administrator*, Order No. K-24074 (Ky. Bd. Tax App. August 29, 2013). In *Pikeville RV Sales,* the Kentucky Board of Tax Appeals (KBTA) announced that from the date of its order in this case (August 28, 2013) that it will dismiss on its own initiative any petition of appeal filed by a non-lawyer on behalf of a legal entity. In *Freibert*, entered on Aug. 29, 2013, the KBTA dismissed an appeal "based upon the fact that the taxpayer, a legal entity, is no longer represented by counsel and cannot proceed unrepresented."

The unauthorized practice of law is prohibited by Rules of the Kentucky Supreme Court, which regulates the practice of law by virtue of Section 116 of the Kentucky Constitution. *See* SCR 3.020; 3.130(5.5); 3.460; 3.470. Both court decisions and unauthorized practice of law opinions of the Kentucky Bar Association ("KBA") have ruled that non-lawyers may not represent legal entities in proceedings before administrative tribunals, including the KBTA. *See, e.g., Kentucky State Bar Assn. v. Bailey*, 409 S.W.2d 350 (Ky. 1966); *Kentucky State Bar Assn. v. Vogt Machine Co.*, 416 S.W.2d 727 (Ky. 1967); KBA U-64; KBA U-34; KBA U-17. This rule equally applies to the representation of individuals by a non-lawyer. *See, e.g.,* KBA U-34. (Access to KBA unauthorized practice of law opinions such as U-34 is available at http://www.kybar.org/244). Thus, an individual who is a non-lawyer cannot file a petition of appeal with the KBTA on behalf of a legal entity or another individual or otherwise represent that entity or individual in proceedings before the KBTA. It should be noted that an individual may represent himself or herself in proceedings before the KBTA concerning his or her own tax liability.

The foregoing is also covered by Section 3 of the KBTA's regulation, 802 KAR 1:010. Taxpayers are advised of this regulatory provision and its contents in final rulings issued by the Department in accordance with KRS 131.110(3).

The KBTA's order in *Pikeville RV Sales* states:

> Up to the date of this order, the Board of Tax Appeals has given the non-attorney who has filed a petition of appeal on behalf of a legal entity the opportunity to retain counsel. If counsel was not obtained as directed, the appeal was dismissed. The Board now concludes, on a

> prospective basis, that the filing of a petition of appeal is itself the unauthorized practice of law.

Thus, the KBTA is treating petitions of appeal filed by non-lawyers on behalf of legal entities and other individuals as nullities. The KBTA's order further states that the appeal will be dismissed and if the 30 days allowed under KRS 131.340(1) for appealing the final ruling has elapsed, the taxpayer will have forfeited its right to appeal a final ruling or other appealable decision or order, such as a decision by a board of assessment appeals. *See Revenue Cabinet v. JRS Data Systems, Inc.*, 738 S.W.2d 828 (Ky. App. 1987).

Department of Revenue v. Cox Interior, Inc., 400 S.W.3d 240 (Ky. 2013). The taxpayer, Cox Interior, Inc. ("Cox") was issued an ad valorem tax assessment following an audit. It did not protest this assessment, paying the taxes instead. Later, within the two-year period for making refund claims allowed under KRS 134.590(2), Cox submitted a refund claim for a portion of the taxes it had paid. The basis of the refund claim was stated by the Court as follows:

> Cox...later determined that the Department's audit improperly listed manufacturing machinery on the non-manufacturing schedule of the return. This was important because manufacturing machinery is subject to a more favorable tax rate than non-manufacturing machinery and is exempt from local tax.

400 S.W.3d at 241. The Department's position was that Cox's refund claim was barred by the last sentence of KRS 134.590(2), which states:

> No state government agency shall refund ad valorem taxes, except those held unconstitutional, unless the taxpayer has properly followed the administrative remedy procedures established through the protest provisions of KRS 131.110, the correction provisions of KRS 133.110 and 133.130, or other administrative remedy procedures.

Similar language appears in KRS 134.590(6), which governs refunds of local ad valorem taxes.

The Court disagreed with the Department's position and ruled that Cox's refund claim should be considered by the Department on its merits. It recognized that the language of KRS 134.590(2) relied upon by the Department "directs the appropriate state agency which is asked to refund the taxes...to determine whether applicable administrative remedies have been exhausted." *Id.* at 245. "*Exactly what those*

administrative remedies are may vary depending on the nature of the controversy, the basis for the taxpayer's challenge." *Id*. (emphasis in italics by Court).

In the case of tangible personal property ad valorem tax assessments, the Court viewed the applicable administrative remedies as consisting of the correction of clerical or other errors described in KRS 133.110; claims under KRS 133.130 that the taxpayer did not own the property in question; and the proper valuation of the property assessed, to be addressed pursuant to KRS 131.110 and 132.486. In this case, Cox's challenge to its liability did not implicate any of these remedies. Cox did not question the values fixed by the assessment that it had not protested, seek to correct clerical or other errors in that assessment, or claim that it was not the owner of the property that had been assessed. *Id.* at 246. Accordingly, its refund claim was not barred by the last sentence of KRS 134.590(2) so long as it properly protested the denial of that refund claim.

The effect of this decision is that if a taxpayer is challenging a valuation fixed by an ad valorem tax assessment, seeking to correct a clerical or error described in KRS 133.110, or claiming that he is not the owner of the property assessed, he will not be able to obtain a refund unless he has pursued the applicable administrative remedy. The refund claim will in that event be barred by the last sentence of KRS 134.590(2) or its counterpart in KRS 134.590(6), if the refund claim relates to local ad valorem taxes.

Department of Revenue v. Commonwealth Agri-Energy, LLC, 2012-SC-00822-D (Kentucky Supreme Court). At issue in this case was the application of a nonrefundable tax credit for the production of ethanol. The amount of the credit is $1.00 for each ethanol gallon produced, but there is a cap of $5,000,000 on the amount of credits that ethanol producers can claim in a given year. *See generally* KRS 141.4242(1); 141.422(3), (10) and (11).

The focus of this case was the procedure for claiming this credit set forth in KRS 141.4242(3), which states:

> Each ethanol producer eligible for the credit provided under subsection (1) of this section *shall file an ethanol tax credit claim for ethanol gallons produced in this state on forms prescribed by the department by January 15 following the close of the preceding calendar year.* The department shall determine the amount of the approved credit based on the amount of ethanol produced in this state during the preceding calendar year and shall issue a credit certificate to the ethanol producer by April 15 following the close of the preceding calendar year.

(Emphasis in italics.)

The taxpayer did not file its application until February 4, 2009. The letter from its controller accompanying the application stated that "I knew there was a reporting requirement for the gallons produced; however, I did not realize it would be so soon after the calendar year end." The Department denied the application as untimely under KRS 141.4242(3).

The taxpayer challenged the Department's denial on the grounds that the application form was not promulgated via the administrative regulation process set forth in KRS Chapter 13A. The taxpayer did not dispute that an application form had in fact been created and available on the Department's website or from the Department upon request, beginning in October, 2008. The Department did incorporate the form (Schedule ETH) in its forms regulation on January 15, 2009. *See* KRS 131.130(3); 103 KAR 3:040 § 1(13) and § 3(1)(a) 13.

The KBTA, Franklin Circuit Court, and Court of Appeals all agreed with the taxpayer's position. The Department's motion for discretionary review of the Court of Appeals' opinion, filed on December 17, 2012, was denied on September 28, 2013; however, the Supreme Court ordered that the Court of Appeals' opinion not be published. *See* CR 76.28(4).

Dayton Power and Light Co. v. Department of Revenue, 405 S.W.3d 527 (Ky. App. 2013). This case concerns the public service corporation ad valorem tax. Under KRS 136.115 to 136.180, the Department assesses for ad valorem tax purposes the operating property of various types of entities called public service corporations - - railway companies, gas companies, water companies, etc. KRS 136.120(1)(a); 136.115(1). The operating property consists of the operating tangible property and the franchise. KRS 136.115(2). The franchise has been defined as the intangible value derived or created by the taxpayer's operations as a public service corporation and is determined by subtracting the assessed value of the tangible operating property from the capital stock or the entire property of the taxpayer, its real and personal, tangible and intangible, property. *See, e.g., Revenue Cabinet v. Comcast Cablevision of the South, Inc.*, 147 S.W.3d 743, 752 (Ky. App. 2003) (stating that "the value of the franchise is determined by subtracting the assessed value of the tangible operating property from the 'capital stock,' which is the 'entire property, real and personal, tangible and intangible, assets on hand, and its franchise as well'")

The question presented by this case is whether the franchise should be "spread" to portions of the operating tangible property or taxed separately. If it is spread to the various classes of operating tangible property, then a portion of it is

subjected to lower state tax rates and exempt from local taxation. *See* KRS 136.120(1)(a); 132.020(1); 132.200. The Department's position in this case was that franchise is a separate and distinct item of property under the applicable statutory provision and thus subject to the 45¢ state rate specified in KRS 132.020(1)(r).

The KBTA disagreed with the Department. The Franklin Circuit Court reversed the KBTA.

On August 10, 2012, the Kentucky Court of Appeals rendered an opinion affirming the circuit court's decision. It held that the franchise of a public service corporation is separate and distinct from its operating tangible property. This franchise is not to be spread over and among other types of assets that may qualify for exemptions. The court further held that the applicable statutory provisions were unambiguous and thus the Department's prior administrative practice was irrelevant to and could not be employed under the doctrine of contemporaneous construction to alter the meaning and effect of these provisions.

The taxpayer petitioned the Court of Appeals for rehearing and the Department also filed a motion for the publication of the opinion. *See* CR 76.28(4)(c). The Court granted the motion for publication and the petition for rehearing to the extent that one of the members of the panel of judges deciding the case now dissented. The opinion was re-issued on November 2, 2012.

On December 3, 2012, the taxpayer filed a motion for discretionary review of the Court of Appeals' opinion with the Supreme Court. This motion was denied on August 21, 2013.

Department of Revenue v. Roanoke Cement Company, LLC, 2014-SC-000149 (Kentucky Supreme Court). At issue in this case is the following natural resources severance tax credit provided for in KRS Chapter 143A.035:

> (1) A credit is hereby allowed against the tax imposed by this chapter on the gross value of limestone which is severed or processed within this state and sold to a purchaser outside of this state.
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> * * * * *
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> (3) The credit allowed in this section shall extend only to a taxpayer who severs or processes limestone through the rip-rap construction aggregate or agricultural limestone stages, and who sells in interstate commerce not less than sixty percent

> (60%) of such stone. The credit shall not be allowed to a taxpayer who processes the limestone beyond the agricultural limestone stage.

It is undisputed that at least 90% of the taxpayer's sales of limestone were completed or consummated (i.e., passage of title and possession occurred) within Kentucky during the period in question. The purchasers of the limestone were located outside Kentucky, however, and they subsequently transported the limestone to points outside Kentucky following the consummation of the sales in Kentucky.

The Department's position in this case is that the credit requires that at least 60% of the sales be consummated outside Kentucky, or in other words, made in interstate commerce. Agreeing with the taxpayer, the circuit court's opinion and order in this case held that the out-of-state location of the purchasers is what determines whether the credit applies.

The Court of Appeals rendered an opinion in the taxpayer's favor on February 21, 2014. The Court agreed with the Department that a "tax credit provision, like a tax exemption statute, should be narrowly construed in favor of the Commonwealth" and "the taxpayer has the burden of establishing its entitlement to the tax credit and must overcome the presumption that the taxing authority of the state has not been relinquished." The Court nevertheless held that the taxpayer was entitled to the credit. It focused on the phrase "outside of this state" in KRS 143A.035(1) and, relying upon a prior corporation income tax decision (*Revenue Cabinet v. Rohm and Haas Kentucky, Inc.*, 929 S.W.2d 741 (Ky. App. 1996)), held that all that mattered in applying the credit was whether a sufficient percentage of the taxpayer's customers or purchasers were located outside Kentucky. The Court dismissed the Department's arguments that KRS 143A.035 must be read as a whole and that Subsection 3 of KRS 143A.035 required that the sales themselves must be in interstate commerce as implicating Commerce Clause concerns relevant to the "fundamentally different" sales and use tax and thus not material to the severance tax.

The Department filed a motion for discretionary review of the Court of Appeals' opinion, which was designated "To Be Published," on March 24, 2014.

Department of Revenue v. Bavarian Trucking Company, Inc., 2011-CA-002198 (Kentucky Court of Appeals). At issue in this case was the construction and application of the income tax credit for recycling and composting equipment provided in KRS 141.390. The Court of Appeals described the business of the taxpayers (referred to as "BTC") as follows:

> BTC collects garbage and transports it to its landfill for disposal. Methane is produced by BTC's landfill operation

> because BTC maintains its landfill in a sealed condition, which forces organic material to decompose anaerobically and generates large quantities of methane gas. This landfill methane gas is collected by BTC and transferred to an electrical plant operated by East Kentucky Power Cooperative where it is burned to generate electricity. BTC's landfill methane gas is the exclusive fuel used to generate electricity at that plant.

BTC claimed that certain of its "equipment purchases and installations for use in its landfill operation" qualified for the credit. These purchases were described by the Court as follows:

> Curbside garbage trucks and trash containers (collection equipment); bulldozers, tractors, excavators and other equipment for use at its landfill (Landfill equipment); piping for general landfill use and to collect and transport the methane; and a flare to burn off methane as needed.

The Court described the use of this equipment as follows:

> The collection equipment is used to collect and transport trash to the landfill, where it will be used to eventually generate methane. The landfill equipment is used to dig space for the trash, cover it up and maintain the landfill in a sealed condition. The piping in the landfill is used to collect the methane and leachate and for other landfill purposes. The flare at the landfill is used as a back up safety system to burn off methane gas if it is not being piped to the power plant; it prevents an excess build up of methane which would risk an explosion.

The KBTA upheld the Department's denial of the recycling credit for the collection equipment, but granted the credit for the landfill equipment necessary for the methane generating process, the piping, and the flare. The Boone Circuit Court affirmed the KBTA's decision.

BTC did not appeal the circuit court's and KBTA's rulings on the collection equipment. The Department appealed the balance of these decisions.

The Court of Appeals agreed with the Department and reversed the circuit court's judgment to the extent it affirmed the KBTA's decision granting the tax credit for the landfill equipment, piping, and flare. The Court held that these items could not qualify as recycling equipment because BTC could not show that landfill methane

gas is post consumer waste, removing methane gas qualifies as recycling, or that the equipment in question was used *exclusively* to process postconsumer waste. KRS 141.390(1)(a) and (b) and (2)(a).

The Court further held that the landfill equipment, piping and flaring did not qualify for the credit as composting equipment either. BTC's activity did not meet the statutory definition of composting nor did the methane produced constitute compost. KRS 141.390(1)(c); KRS 224.01-010(6) and (7)(a).

The Court also noted that subsequent legislative action made it clear that KRS 141.390 was not intended to apply to the production of liquid methane gas for energy. That legislation, enacted in 2007, provided tax credits for the development of renewable energy and the construction of renewable energy facilities and specifically included "landfill methane gas" in the definitions for renewable energy and renewable energy facilities. KRS 154.27-020(1), (3)(d), (4)(e) and (5); 154.20-415(1); 154.27-010(26)(a); 154.20-400(5).

BTC's motion for discretionary of the Court of Appeals' opinion which was designated "Not To Be Published," was denied by the Kentucky Supreme Court on March 12, 2014.

Appalachian Racing, LLC v. The Family Trust Foundation of Kentucky, Inc., ____ S.W.3d ____, 2014 WL 712662 (Ky. February 14, 2014). At issue in this case were whether the Kentucky Horse Racing Commission has authority to license and regulate pari-mutuel wagering on historical horse racing and whether the Department had the authority to tax wagering on historical horse races.

In an opinion rendered on February 20, 2014, the Supreme Court held that the Commission had authority to license and regulate pari-mutuel wagering on historical racing. It found that discovery needed to be taken on whether "the operation of historical horse race wagering...conforms to the requirements of KRS Chapter 230 and 436.480 for pari-mutuel wagering, so as to exempt such wagering from the prohibition of KRS Chapter 528" and remanded the case to the Franklin Circuit Court for that purpose.

The Court further held that the Department lacked the statutory authority to impose a tax upon wagering on historical horse races. The Department had amended a regulation to include a provision extending the application of the pari-mutuel excise tax provided for in KRS 138.510(1) to this activity. The Court ruled that this regulatory provision was invalid. Only the General Assembly can impose a tax and the Department's regulation therefore had to fall within the scope of some statutory authority. In this situation, the statutes imposing the excise tax on wagering on horse racing (KRS 138.510 and 138.511) did not support or authorize

the Department's regulatory action. In arriving at its decision, the Court relied upon "the rule that statutes imposing taxes are to be strictly construed *against* the imposition of the tax."

This decision is final.

AT&T Corporation v. Commonwealth, 2013-SC-00800 (Kentucky Supreme Court). The taxpayer in this case filed an action for declaratory relief asserting that amendments to the sales and use tax statute KRS 139.505 were unconstitutional or being unconstitutionally applied. The taxpayer also asserted that this statute was being erroneously interpreted or applied. It further sought a money judgment for or refunds of the sales and use tax it alleged to have improperly or erroneously paid.

The circuit court dismissed the action in its entirety for the taxpayer's failure to follow the statutory procedure prescribed for obtaining a tax refund and resolving disputes over a taxpayer's entitlement to a refund. *See* KRS 134.580(3); 134.590(2); 131.110; 131.340; 131.370. In an opinion rendered on November 15, 2013 the Court of Appeals affirmed this decision in part, to the extent the taxpayer alleged that the statute was being erroneously or unconstitutionally applied or misinterpreted, but held that the circuit court should not have dismissed the taxpayer's action to the extent that it asserted that the amendments to KRS 139.505 were facially unconstitutional under Ky. Const. § 51. This issue, the Court noted cannot be decided by the KBTA.

The Department's view of this case is that sovereign immunity requires the whole case to proceed via the KBTA under the applicable statutory procedure referred to above. *See, e.g., Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 296 (Ky. 2013). The KBTA's determination of the case on a non-constitutional basis might obviate any need to address any constitutional claims. The circuit court on an appeal from the KBTA's decision pursuant to KRS 131.370 could decide any constitutional issues if it becomes necessary to reach them. KRS 13B.150(2)(a).

On December 11, 2013, the Department filed a motion for discretionary review of this opinion, which is designated "Not To Be Published." This motion is still pending.

Department of Revenue v. Eifler, 2013-SC-00737 (Kentucky Supreme Court). This case involves the construction and application of the Open Records Act. The requestor seeks access to records reflecting the names, addresses, and dates of registration of all taxpayers registered with the Department for purposes of the school utility gross receipts license tax (KRS 160.613 to 160.617).

The Department's position is that to divulge the information sought by the requestor, which is contained on the tax returns submitted to the Department by taxpayers paying the school tax, would violate the statutory provisions making taxpayer and tax return information confidential. *See* KRS 131.190; 131.081(15); 131.990(2). Disclosure of this information is exempt from disclosure under the Open Records Act. KRS 61.878(1)(a) and (l).

In an opinion rendered on October 20, 2013, the Court of Appeals held that disclosure of the information sought - - taxpayers' names, addresses, and dates of registration - - was not exempt from disclosure under the Open Records Act. The Court did not view this information as confidential or private.

The Department has filed a motion for discretionary of the Court of Appeals' opinion, which is designated "To Be Published." That motion is still pending.

Department of Revenue v. AT&T Corporation and Subsidiaries, 2008-CA-001888 (Kentucky Court of Appeals). At issue in this corporation income tax case is the application and validity of KRS 141.200(1) to (7), which permit corporation making up an affiliated group as defined in Section 1504(a) of the IRC to elect to file a consolidated tax return, computing their income tax liability in accordance with that return, instead of filing separate returns. This election once made was binding on both the corporation taxpayers in question and the Department of Revenue for the ensuing 96 months.

AT&T Corporation took advantage of these statutory provisions, electing to file a consolidated return with those subsidiaries with whish it formed such an affiliated group. It later filed refund claims totaling in excess of $6.5 million based upon its contention that only corporations having a nexus with, or property or payroll in, Kentucky could be part of the affiliated group. AT&T also argued that the inclusion in the affiliated group of subsidiaries lacking such a nexus would violate the Commerce and Due Process Clauses of the United States Constitution.

The KBTA ruled in the Department's favor. The Jefferson Circuit Court reversed the KBTA's decision, holding that the subsidiaries in question should be removed from the affiliated group based upon its interpretation of the effect of KRS 141.040(1)(i), which during the period in question exempted from the corporation income tax "[c]orporations having no individuals receiving compensation as defined in KRS 141.120(8)(b) in this state, and whose only owned or leased property located in this state is located at the premises of a printer with which it has contracted for printing, if such property consists of the final printed product, property which becomes a part of the final printed product, or copy from which the printed product is produced."

The Department appealed the circuit court's decision to the Kentucky Court of Appeals. Briefs have been filed in this appeal and oral argument was held on Aug. 5, 2009.